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Nos. 726, 727, 728, 729, 791 Misc., 899 Misc., 948 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1963

ROBERT GRIFFIN, MATTHEW PAIGNEN, CHARLES [illegible], CHARLES TENNEY, ANTHONY PORCELLI, HUGO SCOGGIN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 726, 727, 728, 729, 791 Misc., 899 Misc., 948 Misc.

ROBERT GUIPPONE, MATTHEW PALMIERI, CHARLES SCHIFFMAN, CHARLES TANDLER, ANTHONY PORCELLI, ROCCO SCOPELLITTI AND VITO AGUECI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 310 F. 2d 817.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1962. The petition for a writ of certiorari by Porcelli was filed on December 1, 1962. On December 1, 5, and 7, 1962, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari by Palmieri, Scopellitti, Guippone, Schiffman and Tandler to January 7, 1963. Separate petitions for writs of certiorari were filed by Scopellitti on January 5, 1963, and by Guippone, Palmieri, Schiff-

man, and Tandler on January 7, 1963. The petition for a writ of certiorari by Agueci was filed out of time on January 17, 1963.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury commission in the Southern District of New York could properly select the names of prospective grand and petit juries from voting registration lists.

2. Whether the evidence is sufficient to sustain the convictions.

3. Whether publicity denied petitioners a fair trial.

4. Whether there was improper redirect examination of a principal government witness.

5. Whether plain error was committed in the cross-examination of petitioner Porcelli (No. 791 Misc.).

6. Whether petitioner Scopellitti (No. 899 Misc.) was deprived of the assistance of counsel.

7. Whether the summation of the prosecutor was prejudicial.

8. Whether the instructions to the jury were proper.

9. Whether the government's evidence was procured as a result of wiretapping by state officials.

STATEMENT

The seven petitioners, together with five others, went to trial in the Southern District of New York on 18 counts of a 30-count indictment charging viola-

[1] Agueci's petition was filed seventy days after the entry of the judgment in the court below and was not within the time prescribed by the Court's rules.

tions of the narcotics laws.* Count 1 charged a conspiracy from about September 1, 1958, to May 22, 1961 (the date of the indictment), to import, conceal, buy, sell, and dilute narcotic drugs in violation of 21 U.S.C. 173 and 174. The other counts charged substantive narcotics violations of 21 U.S.C. 173 and 174. All the defendants were charged under the conspiracy count. Petitioners Guippone and Porcelli were charged with eleven substantive violations (counts 11 through 13, 17 through 19, 22 through 25 and 29); Schiffman and Tandler were accused of three substantive offenses (counts 8, 16 and 28); Palmieri (count 5), Scopellitti (count 14) and Agueci (count 20) were each charged with one such violation.

The jury found petitioners guilty as charged. Schiffman was sentenced to twenty-five years' imprisonment. Guippone and Palmieri were each sentenced to twenty years' imprisonment. Tandler, Porcelli and Agueci were each sentenced to fifteen years' imprisonment. Scopellitti was sentenced to ten years' imprisonment.

In brief, the evidence showed a scheme whereby valises and trunks brought by Italian immigrants into the United States were used as a means of smuggling narcotics. At the pier, a baker named Matteo Palmeri would pick up this baggage and transport it to his bakery. The narcotics would then be distributed. Of the petitioners here, Vito Agueci and Rocco Sco-

*During the trial one defendant, Barbeto, was found not competent to stand trial. All of the other defendants were convicted. They all appealed except Maiello who died after the trial. LoBue, Valachi and Cottone have not filed petitions for writs of certiorari.

pellitti were connected with the importation, and the other five petitioners were involved in the subsequent distribution. At the trial, the principal government witnesses were two accomplices, the baker Palmeri and Salvatore Rinaldo, both named in the indictment as co-conspirators but not indicted.

Because of the scope and complexity of the conspiracy and because of petitioners' challenges to the sufficiency of the evidence (see pp. 12–16, *infra*), it is necessary that the evidence on which the convictions were based be set out in some detail.

1. The involvement of Palmeri the baker in the scheme began when he accepted Albert Agueci's offer to participate in diamond smuggling and was then introduced to Luigi LoBue and Vincent Mauro. As part of the scheme, Palmeri went to Pier 84 in May 1959, in July 1959, and again in March 1960, and picked up a valise which he transported to his bakery. On each of the first two occasions, Palmeri, upon LoBue's instructions, distributed packages to an unidentified man pointed out by Mauro, who in return paid Palmeri $15,000 and $13,000, respectively, for LoBue. On the second occasion, LoBue told Palmeri they were handling narcotics. Palmeri also saw him package white powder which had been removed from a blanket in the valise (G.A. 2–23).[1]

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[1] To avoid any possibility of confusion, the names of the petitioners are hereinafter italicized wherever they appear.

[2] The record on file with the clerk of the Court consists of the trial transcript in seven volumes, the original papers and proceedings in the district court and the appendix of the government filed in the court of appeals. The trial transcript is designed herein as "Tr." and the government's appendix as "G.A."

2. The first of two transactions involving *Matthew Palmieri* occurred in July 1959. Shortly before, Frank Caruso found that Salvatore Rinaldo was "interested in delivering junk" and introduced him to Mauro, who in turn placed him in contact with Palmeri the baker (G.A. 18–20, 378–380). Acting on Caruso's instructions, Rinaldo secured one kilogram of narcotics from Palmeri the baker and transferred it to *Palmieri* for $8500. When *Palmieri* quizzed him about the purity of the package, Rinaldo told him to discuss that question with Caruso. Rinaldo turned over the money received to Caruso (G.A. 381–385).

Around March 21, 1960, Rinaldo met *Palmieri* again. After *Palmieri* inquired if the "goods" were as pure as in the prior transaction, Rinaldo sold one kilogram of heroin to *Palmieri* for $8500 (the subject matter of count 5). Rinaldo had previously obtained the substance at Palmeri's bakery. He had also performed tests on the powder which indicated it was heroin (G.A. 399–412).

3. In December 1959, at a meeting of Mauro, Caruso, Rinaldo and Joseph Valachi, Mauro told Rinaldo that Valachi was going to pick up "junk" from them. A few days later Valachi introduced Rinaldo to *Anthony Porcelli*, informing him that *Porcelli* worked for him and would pick up the packages. The next day, Rinaldo gave *Porcelli* one kilogram of narcotics that he had previously obtained from co-conspirator Charles DiPalermo. When payment in full was delayed, Rinaldo told Valachi in *Porcelli's* presence that Caruso did not like the delay (G.A. 386–395). On March 18, 1960, Valachi told Rinaldo that he was

going away and that his interest would be handled by *Porcelli* and Michael Maiello (G.A. 405–409). In April 1960, *Porcelli* brought *Ralph Guippone* to Rinaldo's house, introducing him as a man whom Valachi had mentioned and as a person whom he had known for a long time. *Porcelli* said they could "move some goods" if they obtained it for a reasonable price. When Rinaldo told him the price was $7500, *Porcelli* proposed a three-way partnership. He suggested diluting the narcotics with sugar and selling the excess obtained from the adulteration at a profit. Rinaldo agreed to this arrangement. In May 1960, Rinaldo obtained two packages of narcotics from co-conspirator Salvatore Maneri, after Caruso told him that Maneri was expecting two packages. Rinaldo, *Guippone* and *Porcelli* diluted it with milk sugar. They sold packages weighing a total of two kilograms for $17,400 (G.A. 414–420, 402).

4. At a meeting in April 1960, Mauro and Albert Agueci told Palmeri that narcotics would be imported in trunks with false bottoms instead of valises. John Papalia also attended this meeting. Albert Agueci also said that his brother *Vito* would travel to Italy and would notify Palmeri when a trunk would arrive (G.A. 23–26).[5] That month *Vito Agueci* went to Italy (Govt. Exs. 311–313). In May 1960, Palmeri received a postal letter from *Vito Agueci* in Italy,

[5] In April 1960, there was also a meeting of Caruso, Albert Agueci, Rinaldo and Papalia at which Caruso stated that Albert Agueci and Papalia in Canada would secure goods from Europe and that "we will take care of the distribution down here" (G.A. 412–413).

informing him that a particular passenger would arrive with a trunk on June 2, 1960 (G.A. 26–27).

On June 2, 1960, August 19, 1960, and September 2, 1960, Palmeri brought to his bakery from the pier three separate trunks containing respectively fourteen, ten and sixteen kilograms of powder. On each occasion Rinaldo performed tests on the powder which indicated that it was heroin (G.A. 26–56, 420–424, 436–439, 449–451, 942–946).

5. In June 1960, Rinaldo on advice of Caruso met *Charles Schiffman* at a racetrack. A few days later *Schiffman* introduced Rinaldo to *Charles Tandler* and they agreed that Rinaldo would deliver narcotics to *Tandler*. Several days later, Rinaldo gave three kilograms of "junk" to *Tandler* from the June shipment (the subject matter of count 8) (G.A. 425–430, 939–941). Similar transactions also occurred following the other two shipments. On August 23, 1960, after another meeting with *Schiffman*, Rinaldo delivered three kilograms from the August importation to *Tandler* (the subject matter of count 16) (G.A. 439–440, 945). Again in early October 1960, Rinaldo delivered four kilograms of heroin to Tandler from the September shipment after arrangements had been made with *Schiffman* (count 28). Around October 12, 1960, *Schiffman* and *Tandler* paid Rinaldo $25,000 which he turned over to Caruso (G.A. 461–463, 948–949).

6. On June 24, 1960, *Gaippine, Porcelli* and Rinaldo adulterated three kilograms of heroin from the June shipment. Subsequently *Porcelli* sold three kilograms for which he paid $8500 to Rinaldo, who in turn gave

the money to Caruso (the subject matter of count 11). *Guippone*, *Porcelli* and Rinaldo split an additional $1,500 profit from this sale. Around this time, Rinaldo made two other sales for $4,500, splitting the proceeds with *Guippone* and *Porcelli* (counts 12 and 13) (G.A. 431–434, 942).

In the middle of August 1960, *Guippone*, *Porcelli* and Rinaldo again adulterated two kilograms of heroin from the August shipment. *Porcelli* sold two packages for $16,000. They split $1,000 of this amount and Rinaldo "put $1,500 aside" (the subject matter of count 17). Later in the month, Rinaldo made two additional sales for a total of $5,400, dividing the proceeds with *Porcelli* and Rinaldo (counts 18 and 19) (G.A. 440–444, 945–946).

On September 9 and 10, 1960, *Porcelli*, *Guippone* and Rinaldo diluted four kilograms of narcotics from the September shipment with confectionary sugar. *Porcelli* took two kilograms on each date. In return for each of the two-kilogram packages, *Porcelli* and *Guippone* brought Rinaldo $16,000 (the subject matter of counts 22 and 23). Rinaldo took the money received to Caruso except that he, *Guippone* and *Porcelli* split $500 on each kilogram that they distributed. On September 12 and 13, 1960, Rinaldo sold additional heroin for $5,400, again sharing his receipts with *Guippone* and *Porcelli* (counts 24 and 25); and on October 12, 1960, *Porcelli* took one kilogram for which he and *Guippone* brought Rinaldo $8,000 (count 29) (G.A. 452–454, 456–457, 463–464, 947–949).

7. The August shipment was brought into the United States by *Rocco Scopellitti*. Albert Agueci

had told Palmeri that *Scopellitti* worked for him. After the trunk arrived, Palmeri and *Scopellitti* transported it to the bakery. At the bakery *Scopellitti* told Rinaldo, "Don't worry. I know what it's all about." They opened the trunk and found the packages of powder, weighing ten kilograms, in its false bottom (the subject matter of count 14). *Scopellitti* told Palmeri that he would bring in another trunk whenever requested by Albert Agueci. (G.A. 32–34, 204, 436–439, 691–692, 706–707).

8. Initially Palmeri was unable to secure the September trunk at the pier because he was unable to find the immigrant. Palmeri telephoned Albert Agueci in Canada and was told that *Vito Agueci* would correct the mixup. During the course of the day, Palmeri spoke to *Vito Agueci* over the telephone six to eight times and was advised that an explanatory telegram from Italy had not yet arrived. A few days later a cablegram was sent to *Vito Agueci's* home in Canada containing a particular address. This information was conveyed to Palmeri and Rinaldo who obtained the claim check for the trunk by contacting the address listed on the cablegram (G.A. 36–46, 466–470, 445–449; Govt. Ex. 213). This time Palmeri had mechanical difficulty with his truck. Acting on prior instructions of Albert Agueci, he told Filippo Cottone that he needed transportation for a trunk containing narcotics. Cottone drove his station wagon to the pier where they secured the trunk. Cottone criticized the mixup, stating that he was puzzled because there had been no trouble with the earlier shipments. At the bakery, Cottone, Palmeri and Rinaldo ripped open the trunk's

false bottom and found the packages containing ten kilograms of heroin; after Albert Agueci told Palmeri that there was additional heroin in blankets in the trunk, Rinaldo found six additional kilograms in the blankets (the subject matter of count 20) (G.A. 46–51, 449–451, 946).

9. On October 18, 1960, a conversation between Rinaldo and *Porcelli* on a sidewalk was overheard. *Porcelli* asked, "When can I get ready" and Rinaldo replied, "By Friday night you should be ready to move" (G.A. 1086–1087).

On Friday, October 21, Palmeri and Rinaldo went to the pier to secure another trunk which they loaded in the bakery truck. Palmeri, driving the bakery truck, followed Rinaldo's car. They were both followed by police and federal narcotics agents. On the way, the police and agents stopped their vehicles and arrested them (G.A. 54–56, 465–467, 1087–1091). The truck was seized and was found to contain heroin which was subsequently chemically tested by federal chemists (G.A. 1128–1130). Acting under a search warrant, the police and narcotics agents also seized $21,450, twelve ounces of narcotics and confectionary sugar from a trap at Rinaldo's home (G.A. 467, 1104–1107).

ARGUMENT

1. There is no substance to petitioners' challenge to the method of jury selection employed in the Southern District of New York (No. 728, Pet. 19–22).* See *United States* v. *Greenberg*, 200 F. Supp. 382 (S.D. N.Y.), and *United States* v. *Van Allen*, 208 F. Supp.

* For the most part, each petitioner has adopted general arguments made by the others.

331 (S.D.N.Y.), where similar objections were rejected.

The statute makes any adult citizen eligible for jury duty unless he has been convicted of crime, is unable to read and understand English, or is physically or mentally incapable of rendering efficient service. 28 U.S.C. 1861. The task of selecting qualified persons as prospective jurors has been placed on the jury commission. 28 U.S.C. 1864. Congress has not, however, specified the means by which names of prospective jurors are to be obtained. In the Southern District of New York, names of prospective jurors are selected at random from lists of persons registered to vote in presidential elections. After the names are selected, the prospect appears and an inquiry as to his qualifications is made (Tr. 28-32). Since the qualifications for voting in New York are substantially similar to the federal jury statute (see N.Y. Election Law § 150), the method adopted is a fair procedure for obtaining a representative cross section of the New York community. There is no contention that New York denies any eligible voter the right to register and vote. In a city with the size and heterogeneity of New York, voting lists provide as reasonable a method of securing a cross-section of the community as any.

The amendment of Section 1861 by the Civil Rights Act of 1957 (Section 152, 71 Stat. 638) does not affect this method of selection. This amendment removed the requirement that a person be competent for jury service in the state courts in order to qualify for service on a federal jury. It was designed to prevent state racial discrimination on juries from frustrating the enforcement of the provisions of the Civil Rights Act. See 103 Cong. Rec. 13154, 13238, 13276-13277.

2. Petitioners challenge the sufficiency of the evidence to establish (a) that the white powder in which the defendants were dealing was heroin (No. 728, Pet. 4–8) and (b) that various individual petitioners were linked with the conspiracy (No. 726, Pet. 3–5; No. 727, Pet. 21–28; No. 899 Misc., Pet. 9–11). The sufficiency of the evidence, fully considered by the court below (printed Pets., App. A, pp. 16a–27a), is not an issue warranting review by this Court. In any event, the evidence was clearly sufficient on these points.

(a) There was ample evidence from which the jury could conclude that the white powder imported was heroin. A sample of each shipment of powder in 1960, the subject matter of the substantive counts, was tested by Rinaldo with nitric acid and with mineral oil and heat (G.A. 390, 401, 404, 406, 410, 416, 423, 438, 450). While qualified government chemists in a laboratory would have investigated the powder further, only a single substance, heroin, would have produced the reaction observed by Rinaldo in his tests (G.A. 1121–1122, 1139–1140). The government's case, moreover, did not rest on the tests alone. The secretiveness surrounding the importation and distribution of the powder, the high prices at which the powder was sold and the language used by the petitioners in describing it were among the other circumstances which tended to prove that the powder was heroin. Added to this is the fact that United States chemists tested and found to be heroin both the powder in the last shipment, seized when Rinaldo and Palmeri were arrested on October 21, 1960, and the substance seized from Rin-

aldo's home (G.A. 1087–1089, 1128–1133). See *Toliver v. United States*, 224 F. 2d 742, 745 (C.A. 9).

(b) The evidence as to each individual petitioner was sufficient to support his conviction. As we have noted, this broad scheme operated at two primary levels. There was a central core of conspirators who arranged the exportation of heroin from Italy and its importation into the United States. Another group of conspirators were involved in its distribution in this country. The baker Palmeri and Salvatore Rinaldo (both government witnesses) provided the main link between these two segments of the conspiracy.

Two of the petitioners were connected with the importation. *Scopellitti* brought a trunk containing narcotics into the United States. Whether Rinaldo's testimony should be interpreted, as *Scopellitti* claims (No. 899 Misc., Pet. 10), to show that *Scopellitti* was absent when the narcotics were extracted from the trunk is immaterial. It is clear that *Scopellitti* was present at least when Rinaldo began to break open its false bottom. *Scopellitti's* knowledge of this false bottom together with his statements to Palmeri after the importation that he knew "what it's all about," that he worked for Albert Agueci and that he would bring in another trunk when requested (see pp. 8–9, *supra*) are sufficient to connect him to the narcotics conspiracy. *Vito Agueci* made two trips to Italy to facilitate the importation of narcotics. He acted as a trouble-shooter in determining the difficulty occasioned by the shipment on September 2, 1960, when Palmeri was unable to obtain the trunk at the pier.

The cablegram which led to the trunk's location was sent to his home. See pp. 6–7, 9–10, *supra*. His involvement in the importation was sufficient to link him as a co-conspirator.

The other petitioners, who were tied to the distribution of the narcotics, obtained their supply from Rinaldo. *Guippone* and *Porcelli* assisted Rinaldo regularly, from April to September 1960, in distributing heroin. After the arrival of each shipment, they diluted and packaged heroin at Rinaldo's home. On some sales they would share profits with Rinaldo, and on other sales they would turn over most of the receipts to Rinaldo. In all they were involved in eleven sales from June 25, 1960, to October 12, 1960, that were individually the subject matter of a substantive count. *Schiffman* and *Tandler* on three occasions, June 14, August 16 and October 4, 1960, obtained narcotics valued at $25,000 from Rinaldo. Their participation began when Caruso arranged for Rinaldo to sell narcotics to *Schiffman*. In turn *Schiffman* brought *Tandler* into the conspiracy. They made it possible for the distribution of narcotics to reach another level of supplier. See pp. 5–6, 7–8, *supra*. It is clear that these four petitioners knew or must have known that Rinaldo's activities were part of a larger scheme, success of which would require the unlawful importation of narcotics and their distribution after importation. *United States* v. *Aviles*, 274 F. 2d 179, 188 (C.A. 2), certiorari denied *sub nom. Evola* v. *United States*, 362 U.S. 974. It is immaterial that *Guippone* and *Porcelli* may have been engaged in a separate partnership with Rinaldo distributing narcotics, because their separate

agreement was part of the larger common plan and essential to its success. See *Blumenthal* v. *United States*, 332 U.S. 539.

As to *Palmieri*, the court below found that his guilt had been established under the substantive charge (count 5), but it did not determine his guilt as a conspirator (printed Pets. App. A, 21a). The evidence showed that *Palmieri* purchased narcotics from Rinaldo on two occasions, in July 1959, and again on March 21, 1960. Palmeri the baker was the source of the narcotics both times. The first sale occurred after the co-conspirator Caruso had advised Rinaldo to make arrangements with *Palmieri*, and at delivery Rinaldo told *Palmieri* to discuss with Caruso the purity of the drug sold. On each occasion one kilogram of narcotics was sold for $8,500. See p. 5, *supra*. While there is no direct evidence that Caruso was involved in the second sale, the circumstances were such that the jury could find, in view of the prior sale, that *Palmieri* knew that Rinaldo was selling narcotics on behalf of Caruso. Indeed, *Palmieri* referred to the prior sale. He thus knew that he was furthering the objectives of a narcotics conspiracy consisting of at least Caruso and Rinaldo. That he did not know its complete dimensions or all its participants would not free him of conspiratorial liability. In any event (as the court below noted, printed Pets. App. A, p. 21a), if the conspiracy count fails as to *Palmieri*, his conviction may be sustained upon the substantive count. The trial judge in his charge was careful to compartmentalize the evidence against *Palmieri* (Tr. 6314–6318). The court below, mindful of the problems involved, found that

Palmieri had properly been convicted on the substantive count. See *Schaffer* v. *United States*, 362 U.S. 511.

3. Petitioners contend that certain articles about other alleged members of the conspiracy that appeared in the newspapers during the trial, and of which some of the jurors were aware, deprived them of a fair trial (No. 727, Pet. 3–9; No. 899 Misc., Pet. 11–13; No. 948 Misc., Pet. 7–11). The trial court went to great lengths to assure that petitioners would not be prejudiced by this publicity. We believe that the court's conclusion that a mistrial was not required under the circumstances was a reasonable one.

The jury selected to try the case was impaneled on November 6, 1961 (Tr. 60). About three weeks later, on November 25 and 26, 1961, on a weekend when the case was in recess, newspapers reported that Albert Agueci had been found murdered in a field near Rochester, New York, that Agueci had previously jumped bail in a $150 million narcotics smuggling trial under way in New York, and that this was the second gangland style of slaying of a defendant in the case (William Holmes, another suspected member of the "dope smuggling ring," having been found shot to death in August). The article also reported: "The government charged that Agueci and two other Canadians had for 10 years recruited emigrants from Italy to Canada. Before the emigrants left Italy, the gang would give them steamer trunks with false bottoms containing heroin" (No. 727, Pet. 5–6).

On the following Monday, when the court was back in session, the court examined each juror separately

about the publicity and permitted counsel to submit questions for each juror (G.A. 469–511). The interrogation showed that five jurors had heard or read of the circumstances concerning these deaths. From conversations in the jury room that morning, four other jurors had heard that there had been publicity about the case. The conversations in the jury room did not detail what the publicity was. Of those jurors who heard of the publicity in the jury room, one said that he heard that there had been a death in the family of one of the defendants (G.A. 477); another stated that he was told something had happened to a conspirator not a defendant in the case (G.A. 486); a third said there was a discussion that there was publicity but that nobody stated what it was (G.A. 505); a fourth who arrived late said that she heard "they were all saying there was quite an article in the newspaper" but she did not know the contents of the article and heard no names mentioned (G.A. 506–507). In response to a question whether he had heard any discussion of the publicity in the jury room, one of the jurors who had read the article replied, "I heard nothing definite, but there was just an air in the room that something had happened that I had known about it. I didn't hear anything specifically said" (G.A. 499).

Each juror stated to the court that he would not be influenced by anything read or heard. Upon the request of counsel, jurors were specifically asked if they could give *Vito Agucci* a fair trial. They all said they could. No similar request was made to ask similar questions concerning any other defendant. The court

in its final instructions told the jury that in arriving at its verdict it should be uninfluenced by anything read, heard, seen, or discussed in private conversation (Tr. 6378); it should only consider the evidence presented in court (Tr. 6391).

The problem of how to deal with publicity does not lend itself to rigid formulation. The trial judge has a large area of discretion in deciding whether the jurors have been prejudiced. He has the "feel" of the case and is in a far better position to gauge the effect of such information on a jury than an appellate court. If the harmful effect on the jury is such that it is impossible for a jury to disregard it, then a mistrial should be granted. In making this determination "each case must turn on its special facts." *Marshall* v. *United States*, 360 U.S. 310, 312. The special fact in the *Marshall* case was that the publicity seen by the jurors contained information about the petitioner himself which had previously been excluded as prejudicial by the court and which the government claimed would have refuted his defense of entrapment. The information was closely connected to the defense. Its potent effect had been attested by both the court and the government prior to the appearance of the publicity. In these circumstances this Court found that it was unlikely that jurors could decide the case on the facts of record or that a curative instruction would have been of any avail.

Unlike the *Marshall* case, the publicity here did not relate to any petitioner on trial and did not directly relate to any trial issue. It bore only tangentially on the issues which the jury was called upon

to decide, involving speculation as to the cause or meaning of the deaths. There was thus no substantial likelihood that the jury would decide the guilt of these petitioners on the basis of the extrajudicial information. Since the harmful effect of the publicity was remote, the judge could consider and give weight to the belief of the jurors that they could disregard the publicity. An honest and conscientious juror could disregard this extrajudicial information and determine the guilt and innocence of each petitioner on the evidence presented in court. The conclusion of the trial court that they would not be swayed by the publicity was a reasonable one.

At worst, the circumstances disclosed by the publicity are analogous to those cases where some defendants have entered pleas of guilty, and the jury has been informed of such pleas. As long as the jury is aware that such pleas should not be considered, it has been held that trial courts may deny requests for mistrials. See *United States* v. *Feldman*, 299 F. 2d 914 (C.A. 2), certiorari denied, 370 U.S. 940; *United States* v. *Crosby*, 294 F. 2d 928, 948–950 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984.[8]

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[8] Of the counts on trial, Albert Agueci was named as a defendant in only the conspiracy count, and William Holmes was named as a defendant in the conspiracy count and in two of the eleven substantative counts in which *Guippone* and *Porcelli* were defendants.

[9] *Palmieri* also argues (No. 727, Pet. 6–9) that he was prejudiced by publicity resulting from a state court narcotics trial involving defendants with Italian names. His claim that the common subject matter of the trials and the Italian names were harmful is without merit. It was made clear to the

4. During the redirect examination of Salvatore Rinaldo, the government was permitted to introduce into evidence portions of statements made by the witness on October 23 and 24, 1960, to state officials, including a state district attorney named Facelle (G.A. 950–987). The court, both at the time of admission and in its final charge, instructed the jury that these statements were admitted only on the issue of credibility (Tr. 3440–3442, 6382–6383).

Petitioners *Tandler* and *Schiffman* argue that this evidence was improper because nothing in their cross-examination opened the door for this evidence (No. 729, Pet. 14–16). The record shows, however, that the trial court did not abuse its discretion in admitting the evidence. Rinaldo was cross-examined at great length by the attorney for *Tandler* and *Schiffman* (G.A. 511–606, 927–935) and by the other attorneys (G.A. 606–926). Counsel for *Tandler* and *Schiffman* alluded to the October 23 and 24 statements, as well as to other statements made by Rinaldo on October 31, 1960, and January 26 and 27, 1961. Thus, he asked if Rinaldo had been interviewed by Facelle several days after his arrest (which had taken place on October 21, 1960) and whether the statement on January 26, 1961, reflected matters he had previously told Facelle (G.A. 535–537, 747). He also asked Rinaldo if he recalled mentioning *Schiffman* and *Tandler* in his January 26, 1961, statement; the witness replied that he did not remember (G.A. 606).

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one juror who was confused on names that the state case involved an individual named Russo and not Caruso (Tr. 965).

Counsel's implied comparison between the January 26 statement and the statements Rinaldo had made shortly after his arrest (*i.e.*, the October 23 and 24 statements) plainly opened up the question of what the latter statements contained, and it was proper for government counsel to read relevant portions of them into the record. Moreover, the cross-examination could have left the jury with the impression that Rinaldo had not mentioned either *Schiffman* or *Taudler* in his various statements; it was thus proper to show that he had in fact mentioned these two in his October statements (G.A. 960–961, 975–976, 987). Under the circumstances, it was well within the trial court's discretion to allow portions of the October statements to be read into the record on redirect examination. See *United States* v. *Lee*, 276 F. 2d 605, 608 (C.A. 2), certiorari denied, 363 U.S. 812; *Affronti* v. *United States*, 145 F. 2d 3, 7–8 (C.A. 8).

5. Petitioner *Porcelli* testified in his own behalf that he was in the policy gambling business with Rinaldo and *Guippone* between March and the end of September 1960, the period of time that Rinaldo's testimony placed him actively in narcotics transactions (G.A. 1147–1148). This relationship terminated, he said, because Rinaldo cheated his partners. On direct examination, he also testified that he never sold narcotics or conspired to violate the narcotics laws at any time (Tr. 4991–4992). On cross-examination he detailed how his wagering business operated (G.A. 1155–1165), admitting that he knew it was a crime to be in the gambling business without a federal tax

stamp (Tr. 5026). When asked if he was in the gambling business in 1959, he responded that he might have been but was not sure; he did not know (G.A. 1167). He then testified that he did not know if he was in the gambling business in 1957 or 1958. At this point, when his lawyer asked the court to instruct *Porcelli* that he could assert his constitutional privilege against answering, the court allowed *Porcelli* to consult with his attorney. When *Porcelli* returned to the witness stand he declined to answer separate questions as to whether he was in the gambling business in the years 1941 through 1948, on the ground of self-incrimination (G.A. 1168–1170). No objection was made to any of these questions. On redirect, his counsel elicited testimony that *Porcelli* was 14 or 15 years old in 1943 (G.A. 1170). No comment was made on this claim of privilege in closing argument. The court in its instructions told the jury that no adverse inference should be drawn from the assertion by any witness of the privilege against self-incrimination (Tr. 6384).

Under *Porcelli's* direct testimony, it became a relevant issue to determine whether he had engaged in wagering activities at times other than the period of the indictment. *Porcelli's* testimony that he had not sold narcotics at any time also opened up a wide area for cross-examination. It was thus proper for the prosecution to cross-examine him as to whether he had been in the gambling business in other years. While perhaps it would have been better practice, once it became clear that *Porcelli* would probably

claim the privilege,[10] for the prosecutor to have asked one broad question, petitioner's counsel did not object to the reference to each year. Moreover, any prejudice resulting from this interrogation was dispelled by the court's instructions.

6. Petitioner *Scopellitti* was represented at the trial by appointed counsel Jerome Lewis, the retained counsel for defendant Filippo Cottone. *Scopellitti* claims that his indigence resulted in a denial to him of assistance of counsel because Lewis could not effectively represent both him and Cottone (No. 899 Misc., Pet. 17–21).

Scopellitti, who had been arraigned on July 21, 1961, had indicated to the court that his brother was going to come from Canada and make arrangements to retain D. M. Markowitz to represent him, and Markowitz was named as attorney to protect his rights up to the trial time (S. Tr. 10).[11] On August 3, 1961, Markowitz, who also represented Albert Agueci and *Vito Agueci*, included *Scopellitti* as a movant in a joint motion for a bill of particulars. The court on August 24, 1961, granted in part various motions for a bill of particulars filed by the different defendants. On August 29, 1961, the question of appointment of trial counsel for *Scopellitti* came before the court, (S. Tr. 1). *Scopellitti* told the court that his brother

[10] In light of his direct examination, it seems likely that *Porcelli* had waived his right to refuse to testify on grounds of self-incrimination. Cf. *Rogers* v. *United States*, 340 U.S. 367; *Johnson* v. *United States*, 318 U.S. 189.

[11] We are lodging with the Clerk of the Court the transcript of certain proceedings on August 29, 1961, here designated as "S. Tr."

was sick and could not come from Canada and that he himself had no money with which to engage a lawyer. The court said it would assign counsel and asked Markowitz if he was aware of any conflict that might exist between *Scopellitti* and the other defendants whom he represented. Markowitz, who at the time represented five defendants, said that he needed the help of associate counsel to handle so many defendants' (S. Tr. 11).[12] The court then asked if any attorney who represented other defendants who had no conflict of interest would defend *Scopellitti* so that it would not be necessary to draft an attorney to try a case scheduled to last four weeks. The court then asked Jerome Lewis, Cottone's attorney, as to his position. Lewis said that he represented a defendant who never had been arrested and that, as a matter of trial strategy, he would not represent a second defendant with an arrest record. He was assured that *Scopellitti* had no such record. The court suggested that Lewis talk to *Scopellitti* and stated: "For the time being I will assign you. I would very much appreciate if after you satisfy yourself there is no conflict of interest you can do it. * * * If you can protect your client's interest by doing this, I would appreciate it" (S. Tr. 11–14). The court, through an Italian interpreter, told *Scopellitti* that he was appointing Mr. Lewis "who represents another defendant, to act as [your] lawyer" and that Lewis was a very able lawyer of very great experience. *Scopellitti* indicated

[12] In addition to Albert and *Vito Alguci*, Markowitz represented Arnold Barbeto, Frank Caruso, and Salvatore Maneri.

that he understood (S. Tr. 14). The trial itself began on October 27, 1961, and Lewis acted as attorney for both Cottone and *Scopellitti*.[15]

There is a hollow ring to *Scopellitti*'s argument that his indigence forced him to share an attorney with another defendant. *Scopellitti* himself had sought to retain an attorney who, with his associate, represented five other defendants. The court, in appointing a lawyer who represented one other defendant, did what *Scopellitti* was trying to obtain funds to do. His poverty did not compel him to have the assistance of counsel who represented another. Unlike *Glasser* v. *United States*, 315 U.S. 60, the court did not thrust dual representation upon an unwilling defendant. Mr. Lewis, an experienced attorney, made a pretrial investigation and saw no injury either to retained or appointed client. He made no objections on that ground during the trial. There is no basis for a claim of injustice now.

The record shows no conflict of interest between Cottone and *Scopellitti*. The testimony tying *Scopellitti* and Cottone to the crimes charged centered on separate shipments. *Scopellitti* brought a trunk involved in the August shipment from Italy to the United States and assisted Palmeri and Rinaldo in removing the narcotics from its false bottom at the bakery (see pp. 8–9, *supra*). Cottone lent his station

[15] Of the twelve defendants who went on trial, only three, Maiello, *Palmieri* and Valachi, had separate counsel. *Vito Agueci* and Barbeto were represented jointly by Markowitz and a Mr. Krum. The other clients of Markowitz had become fugitives. LaBue, *Guippone* and *Porcelli* had the same lawyer. *Schiffman* and *Tandler* also had joint representation.

wagon and his labor for the removal of the September trunk from the pier, and assisted in the removal of narcotics. There is nothing in the record that even suggests the possibility that the defense of *Scopellitti* was inhibited by counsel's representation of Cottone. The case against both depended in large measure on the credibility of Palmeri and Rinaldo. Lewis cross-examined both of them extensively to try to impeach their credibility generally (G.A. 170–261, 606–714) and particularly on behalf of both *Scopellitti* (G.A. 199–206, 665, 690–698, 706–707) and Cottone (G.A. 206–261, 666, 698–709). Both *Scopellitti* and Cottone testified in their own behalf (G.A. 1142–1146). Lewis made an extensive closing argument for each (Tr. 5945, *et seq.*, and 5993, *et seq.*). The jury was advised that the court had appointed Mr. Lewis to represent *Scopellitti* and that his appointment was without fee (Tr. 4665, 5941). The record is thus barren of any prejudice flowing from his dual representation.[1]

7. *Scopellitti* (No. 899 Misc., 14–17, 20) and *Palmeri* (No. 727, 16–21) argue that the reference to Mr. Lewis' representation of both *Scopellitti* and Cottone made in the course of the government's three-hour summation to the jury (Tr. 6062–6187) was so prejudicial as to compel a mistrial. The prosecutor argued that it would be an amazing coincidence if the theories of the defendants, as expressed in the closing

[1] The admission into evidence of the pretrial statement of *Scopellitti* has no relevance to the issue of the quality of his legal representation. *Scopellitti* was not denied the opportunity to object to its admissibility at the trial and its admission into evidence could in no way benefit Cottone.

argument of counsel, were true. He then pointed out various specific coincidences to the jury. He argued that Cottone and *Scopellitti* were represented by the same lawyer; that in a pretrial statement, Cottone had said he had never gone to the pier during 1960; that *Scopellitti* had said he brought only two items of personal luggage with him; and that both did not know what their interviewers were talking about. The prosecutor then stated that it might have been expected that they would testify to these same facts at the trial. He then argued: "They are both represented by Mr. Lewis. Both of them take the stand and both of them have almost identical defenses." He then referred to their trial testimony, which was similar in that each said he transported a trunk as a favor to another, unaware of its contents. The prosecutor then noted another coincidence in the case: that both *Vito Agucci* and *Scopellitti* gave the same reason for traveling to Europe—visits to sick relatives (G.A. 1177–1179).

It is clear that, if the prosecutor had not mentioned Mr. Lewis in his argument, his summation would have not been subject to criticism. It was proper to argue that it was suspicious that both *Scopellitti* and Cottone had made dissimilar pretrial statements, but that their trial testimony was similar and not in accord with their earlier statements. It was likewise proper argument to point out that *Scopellitti* and *Vito Agucci* both testified that they had visited Europe during the same period of time for the same reason. The emphasis of this portion of the closing statement was on the improbability of such corresponding circumstances.

The reference to Mr. Lewis was minor in the *Scopelliti*-Cottone coincidence, and was completely absent from the *Scopelliti*-*Agueci* coincidence. Viewed in the context of the lengthy trial, it would not convey the impression that Mr. Lewis had suborned perjury. In no event is there any basis for concluding that any of the petitioners was prejudiced by the reference to Mr. Lewis.

8(a). Petitioners claim (No. 727, Pet. 9–16) "plain error" in the conspiracy instructions, contending that they did not require that a defendant have knowledge of the illegal importation of narcotic drugs. Examination of the instructions (Tr. 6205–6396, 6445–6446) shows that the jury was adequately charged on this issue. The court instructed the jury that it must find a narcotics conspiracy among the persons charged as conspirators during the time set forth in the indictment and the commission of an overt act. The jury was also told it must find as part of this conspiracy either that narcotic drugs were unlawfully imported into the United States or that the drugs were received after importation with knowledge of their illegal importation or that "the said narcotic drugs" were adulterated prior to distribution. Finally, the jury was instructed that "[t]he fourth and final element you would have to find as to each of the defendants is that he knowingly became a member of the conspiracy" (Tr. 6247–6251). The court in explaining knowledge stated that it was not necessary that a conspirator be fully informed as to all details of the conspiracy, provided he had "knowledge of at least some of the common basic purposes and of the central or

primary objectives and aims of the conspiracy" (Tr. 6254). Since the common basic purpose of the conspiracy here was trafficking in illegally imported drugs, it was clear, as the court below found (printed Pets. App. A, pp. 13a–16a), that the instructions did require a finding that each defendant had knowledge that the central objective of the conspiracy was importing or distributing illegally imported drugs.

(b) Defendants Lo Bue, *Palmieri*, Valachi and *Tandler* did not testify. As to the first three, the court charged separately that the particular defendant's failure to testify created no inference against him, and that the jury should not consider that fact in its deliberations (Tr. 6301, 6306, 6385). As to *Tandler*, after the court instructed that his failure to testify created no inference against him, the court stated: "As you know, under the Constitution, Fifth Amendment, no defendant in a criminal case can be compelled to be a witness against himself; and that means that in a criminal case a defendant has the prerogative and privilege not to testify, and the fact that he does not testify does not, in any way, directly or indirectly, permit you to draw any inference adverse to the defendant. A defendant has the right to put the government to its proof" (Tr. 6358–6359). When petitioners objected to the reference to the Fifth Amendment, the court gave a supplemental charge stressing that a defendant has an unqualified right not to testify, that no inference should be drawn from his failure to testify, and that the legal theory for this rule was immaterial (Tr. 6445).

The reference to the Fifth Amendment did not, as *Tandler* contends (No. 729, Pet. 3–13), constitute an unfavorable comment by the court on his failure to testify. The jury knew from the testimony presented by the various defendants in the case that each defendant had an option to testify or not as he saw fit. The jury was properly told not to draw any inference from the failure of any defendant to testify. The mere statement that the Fifth Amendment to the Constitution provides that no defendant in a case can be compelled to testify did not turn these words of the cautionary instruction inside out and create its antithesis—that adverse inferences should be drawn against such defendants.

(c) There is no merit in the contention advanced by *Schiffman* (No. 728, Pet. 9–18) that the trial judge did not properly compartmentalize the circumstantial evidence relating to a particular substantive count against a particular defendant. The court instructed the jury that it must be convinced that the substance involved in each substantive count was heroin. It charged that as to each count the jury must determine, count by count, "whether or not the Government's evidence as it relates to each count proves that the substance was heroin hydrochloride to the knowledge of the defendant or defendants named in that count. It is your recollection and your recollection alone that determines whether or not the following items advanced by the Government's contentions prove, with respect to each substantive count, concerning which the asserted items of proof respectively relate, that the substance was heroin hydrochloride" (Tr.

6280–8261). The court then summarized the seven general contentions which, in the government's view, showed that the substance involved was heroin, of which the test performed by Rinaldo was one (printed Pets. App. A, p. 23a). As to each of these items, it also set forth the general defense position (Tr. 6282–6286). In so far as these general items related to a number of counts, the court was not obliged to repeat them as to each. The court concluded this phase of the charge by again telling the jury that it "must decide on the basis of all the evidence as you recall it, on a count by count basis, whether or not it was actual heroin, or heroin hydrochloride" (Tr. 6287). The court later discussed the issues as they related to each count and each defendant, summarizing the contentions of the government and each defendant (Tr. 6301–6370). A reading of the charge shows that it was painstaking in its compartmentalization. The jury was adequately instructed to determine the guilt of each petitioner on a personal basis.

9. Between September 23 and some time in October, 1960, pursuant to an order of a state court, state officials placed a wiretap on the telephone line of Salvatore Rinaldo. In the middle of October they also tapped the telephone of the Galeria Dominic, an art gallery in which Rinaldo had an interest. After holding extensive hearings (Tr. 6562–7457), the trial court concluded that "[t]he Federal Government's case against these convicted defendants was completely free from the taint of wiretapping" (Tr. 7456–7457). Petitioners attack this conclusion primarily on the ground that the testimony which supports this conclu-

sion was incredible (No. 726, Pet. 5–7; No. 728, Pet. 23–28).

The record shows the following:

Rinaldo was under surveillance by both federal agents and state officials (G.A. 1180, 1208). In late August or early September, William Holmes told a federal narcotics agent that Rinaldo was operating the art gallery (G.A. 1204–1205). On September 8, 1960, a federal narcotics agent purchased narcotics from Maiello, one of the co-conspirators (G.A. 1113–1117). Maiello and Holmes, as the trial evidence disclosed, had purchased narcotics from Rinaldo (G.A. 418–420). On September 23, state officials began their wiretap. In the first part of October, state officials began working with the Bureau of Narcotics in the investigation of Rinaldo (G.A. 1181). The two investigations, although overlapping, were kept separate (G.A. 1202, 1206–1207). The federal officials had no knowledge of the wiretap (G.A. 1208–1211). The state officials, involved in the wiretap, testified that they disclosed no information obtained from the taps to federal agents (G.A. 1184, 1185, 1188, 1190). By understandable coincidence, on October 18, 1960, state and federal officials both observed *Porcelli* meet Rinaldo at the art gallery. A narcotics agent requested a state deputy sheriff to walk near Rinaldo and *Porcelli* for the purpose of overhearing their conversation. The sheriff overheard one of them tell the other to be ready on Friday night (G.A. 1204–1205, 1207). Friday was October 21, the day on which state and federal officials followed Rinaldo and Palmeri and subsequently arrested them (see p. 10, *supra*).

The record thus furnishes ample support for the trial court's conclusion that this prosecution arose from sources other than wiretapping by the State.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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